IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO. 2140 OF 2006

VENKATESH RAJARAM SHETYE .. PETITIONER

Versus

THE STATE OF MAHARASHTRA & ORS... RESPONDENTS

Mr. M.V. Kini i/b Kinjal Haria for petitioner

Mr. S.I. Jayakar for R-2

Mr. D.R. More, APP

CORAM:-SMT. RANJANA DESAI, J.

DATED:- 13/11/2006

P.C.

. The petitioner was convicted by the Metropolitan Magistrate, 13th Court, Dadar, Mumbai in Case No. 3594/SS/05 for offence punishable under Section 138 of the Negotiable Instruments Act and sentenced to suffer S.I. for six months. He is directed to pay Rs.4,50,000/- as compensation to the complainant.

2. Being aggrieved by this judgment and order, the petitioner preferred an appeal in the court of Sessions for Greater Bombay being Criminal Appeal

No. 47 of 2006. It appears that the appeal was admitted on 28/2/06. It appears that on that day the petitioner filed an application for additional evidence under Section 391 of the Code of Criminal Procedure ("Code" for short). The said application was allowed to be withdraw with liberty to move the same at the relevant time.

3. Thereafter the petitioner filed a fresh application for additional evidence in July, 2006. By the impugned order, the learned Sessions Judge rejected the said application and hence this writ petition.

4. I have heard the learned counsel appearing for the petitioner at great length. The learned counsel contended that the learned Sessions Judge erred in rejecting the application. He submitted that in the interest of justice the learned Sessions Judge ought to have allowed the petitioner to lead the additional evidence. In support of his submissions, the learned counsel relied on various judgments of the Supreme Court in **Mohanlal Shamji Soni v. Union of India & Anr., 1991 Supp (1) S C C 271**, **Anil Sharma & Ors. v. State of Jharkhand, (2004) 5 S C C 679** and **Zahira Habibulla H. Sheikh**

& Anr. v. State of Gujarat & Ors., 2004 S C C (Cri.) 999.

5. The learned counsel also contended that the learned Sessions Judge ought to have appreciated that the petitioner was not properly guided by his counsel and it is because of wrong advice that the petitioner did not prefer any application under Section 315(1)(a) of the Code. He therefore, submitted that this court should set aside the impugned order and allow the petitioner to lead additional evidence.

6. The learned counsel for the respondent on the other hand strenuously opposed the grant of petitioner's application. He submitted that no interference is necessary with the impugned order.

7. Section 391 of the Code imposes discretion on the appellate court to permit a party to adduce additional evidence if it thinks that additional evidence is necessary. Needless to say that this discretion has to be exercised with caution and circumspection. It is not that in each and every case that the party can be allowed to adduce additional evidence.

8. In my opinion, reliance placed by the learned counsel for the petitioner in the above judgments is wholly misplaced. The judgments of the Supreme Court in those cases were confined to the peculiar facts and circumstances with which the Supreme Court was dealing. The Supreme Court has not laid down an absolute proposition that in each and every case a party must be allowed to lead additional evidence. In fact in Anil Sharma's case (supra) the Supreme Court was very clear that appellate court while considering the application under Section 391 of the Code has to consider genuineness of the prayer in the context as to whether the witness concerned had fair opportunity to speak the truth earlier and should not accept it in a routine manner.

9. In the present case application filed by the petitioner for permission to lead additional evidence does not state for what purpose the additional evidence is sought to be adduced. The application is totally vague. It was argued before me that it is the petitioner's counsel who misguided him and, therefore, the petitioner did not step into the witness box. This was to get

over the observations made by the learned Sessions Judge that the petitioner has not complied with the provisions of Section 315(1)(a) of the Code which requires him to make the request in writing for adducing additional evidence. However, in the application there is no clear averment stated in what manner the petitioner's advocate misguided him. It is only stated that the petitioner's advocate had not suggested that the petitioner could be examined as defence witness. This is hardly any explanation. The fact remains that though in 313 statement the petitioner has stated that he wants to lead evidence he has not made any written application. I cannot lose sight of the fact that in this case the petitioner is charged with an offence under Section 138 of the Negotiable Instruments Act. If frivolous applications made at the appellate stage praying that the appellant be permitted to adduce additional evidence are allowed in this manner the very purpose of intention of the legislature behind enacting this Act will be frustrated. Such application could be allowed, if a proper case is made. It is only in exceptional circumstances as such application is made out. On merits I am of the opinion that no case is made out, hence petition cannot be entertained and is

dismissed.

JUDGE.